No. 02-1432

Supreme Court, U.S.
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In The Supreme Court of the United States

DANIEL HEIMMERMANN AND EMILY HEIMMERMANN, BOTH INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

FIRST UNION MORTGAGE CORPORATION,
Respondent.

BETH A. RICHARDSON AND PAMELA C. HIRSCH, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, DAVID L. HIRSCH,
Petitioners,

v.

BANKAMERICA CORPORATION, A DELAWARE CORPORATION, BANK OF AMERICA FSB, INC., A HAWAII CORPORATION, BANKAMERICA MORTGAGE, A DIVISION OF BANKAMERICA FSB, A HAWAII CORPORATION,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Whether the court of appeals erred by deferring to an agency's clarification of its own prior ambiguous Statement of Policy interpreting an ambiguous statutory provision, where such deference meant departing from an earlier decision of the court of appeals interpreting the prior Statement of Policy.

RULE 29.6
CORPORATE DISCLOSURE STATEMENTS

First Union Mortgage Corporation (now known as Wachovia Mortgage Corporation) is a wholly-owned subsidiary of Wachovia Bank, National Association, which is a wholly-owned subsidiary of Wachovia Corporation. Wachovia Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

BankAmerica Mortgage (operating now as Bank of America Mortgage) was a division of Bank of America, FSB, and Bank of America NT&SA (both of which have been succeeded by Bank of America, N.A.). Bank of America, FSB, was a wholly-owned subsidiary of BankAmerica Corporation (which has been succeeded by Bank of America Corporation). Bank of America Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENTS	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT	2
1. Statutory and Regulatory Framework	2
2. Proceedings Below	9
SUMMARY OF ARGUMENT	13
REASONS WHY THE PETITION SHOULD BE DENIED	15
A. The Decisions Below Are Not Contrary To This Court's Decisions Involving Judicial Readings Of Unambiguous Statutes	15
B. There Is No Disagreement Among The Courts Of Appeals Regarding Whether A Court Should Defer To A Clarifying Agency Interpretation Of An Ambiguous Statutory Provision That Departs From A Prior Interpretation	20
C. The Question Whether Deference Is Owed HUD's 2001 Statement Of Policy Does Not Warrant Review	22
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) 23, 24

Auer v. Robbins, 519 U.S. 452 (1997) 28

Barnhart v. Walton, 535 U.S. 212 (2002).....24, 25

Black v. Cutter Labs., 351 U.S. 292 (1956).....14

Boulware v. Crossland Mortgage Corp., 291 F.3d 261 (4th Cir. 2002) 29

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).....28

C.E.K. Indus. Mech. Contractors, Inc. v. NLRB, 921 F.2d 350 (1st Cir. 1990).....21

Chapman v. United States, 500 U.S. 453 (1991).....16

Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002).....23

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).....*passim*

Christensen v. Harris County, 529 U.S. 576 (2000).....24

Clackamas Gastroenterology Assocs., P.C. v. Wells, 123 S. Ct. 1673 (2003).....25

Culpepper v. Inland Mortgage Corp., 132 F.3d 692 (11th Cir.), *clarified on reh'g*, 144 F.3d 717 (1998).....6, 7, 18

Culpepper v. Irwin Mortgage Corp., 253 F.3d 1324 (11th Cir. 2001), *cert. denied*, 534 U.S. 1118 (2002).....*passim*

Fiore v. White, 531 U.S. 225 (2001) 18

TABLE OF AUTHORITIES – Continued

Page

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) 24, 27

Glover v. Standard Fed. Bank, 283 F.3d 953 (8th Cir.), *cert. denied*, 123 S. Ct. 344 (2002) ..... *passim*

Good Samaritan Hosp. v. Shalala, 508 U.S. 402 (1993) 14

Grocery Mfg. of Am. v. Gerace, 755 F.2d 993 (2d Cir. 1985), *aff'd mem.*, 474 U.S. 801 (1985) 21

Haug v. Bank of Am., N.A., 317 F.3d 832 (8th Cir. 2003) 29

Herman v. NationsBank, 126 F.3d 1354 (11th Cir. 1997) 23

International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB, 843 F.2d 770 (3d Cir. 1988) 21

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27 (1993) 22

Krzalic v. Republic Title Co., 314 F.3d 875 (7th Cir. 2002), *pet. for cert. filed*, No. 02-1430 (Mar. 26, 2003) 15, 25, 28, 29

Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) 15, 16, 17, 19

Maislin Indus., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 15, 16, 19

NLRB v. Bufco Corp., 899 F.2d 608 (7th Cir. 1990) 21

NLRB v. Webcor Packaging, Inc., 118 F.3d 1115 (6th Cir. 1997) 21

National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365 (Fed. Cir. 2001) 21

TABLE OF AUTHORITIES – Continued

Page

Neal v. United States, 516 U.S. 284 (1996) 15, 16, 17

Norwest Corp. v. Commissioner, 69 F.3d 1404 (8th Cir. 1995).....21

O'Sullivan v. Countrywide Home Loans, Inc., 319 F.3d 732 (5th Cir. 2003).....18, 19

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991).....16

Rostker v. Goldberg, 453 U.S. 57 (1981).....27

Satellite Broad. & Communications Ass'n of Am. v. Oman, 17 F.3d 344 (11th Cir. 1994).....19, 20

Schmitz v. Aegis Mortgage Corp., No. 97-2142, 1998 U.S. Dist. LEXIS 22736 (D. Minn. Aug. 3, 1998).....8

Schuetz v. Banc One Mortgage Corp., 292 F.3d 1004 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 994 (2003).....*passim*

Skidmore v. Swift & Co., 323 U.S. 134 (1944).....27

Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996) 16, 24

Stinson v. United States, 508 U.S. 36 (1993).....28

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994).....28

United States v. Graham Mortgage Corp., 740 F.2d 414 (6th Cir. 1984) 25

United States v. Mead Corp., 533 U.S. 218 (2001) ...21, 24, 25

Wisniewski v. United States, 353 U.S. 901 (1957).....17, 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES, REGULATIONS, AND RULES

Real Estate Settlement Procedures Act, 12 U.S.C.
§ 2600 *et seq.* 2
§ 2607(a) ..... *passim*
§ 2607(b) 28, 29
§ 2607(c) ..... *passim*
§ 2607(c)(2) 2
§ 2617(a) 2, 11, 24, 25
§ 2617(b) 2, 27

Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* 4, 27

12 C.F.R.
§ 226.2(a)(2) 4
§ 226.24(b) 4

24 C.F.R. § 3500.4(a)(1)(ii) 2

Department of Housing and Urban Development, *Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers; Final Rule*, 64 Fed. Reg. 10,080 (Mar. 1, 1999) ..... *passim*

Department of Housing and Urban Development, *Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b); Final Rule*, 66 Fed. Reg. 53,052 (Oct. 18, 2001) ..... *passim*

67 Fed. Reg. 49,143 (2002) 26

TABLE OF AUTHORITIES – Continued

Page

Fed. R. App. P. 35(a)(1) 20

Fed. R. Civ. P. 23(b)(3).....4, 6, 24

MISCELLANEOUS

H.R. Conf. Rep. No. 769, 105th Cong., 2d Sess. (1998).....5, 27

Martinez Moves to Protect Homebuyers; Calls for Simplified Process, HUD News Release No. 01-105 (Oct. 15, 2001), *available at* www.hud.gov/news/release.cfm?content=pr01-105.cfm. 26

T. Merrill & K. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833 (2001) 21

INTRODUCTION

Petitioners seek review of decisions in which the Eleventh Circuit deferred to a Statement of Policy by the United States Department of Housing and Urban Development (HUD) explaining how to determine whether a particular payment to a mortgage broker, known as a yield spread premium, is consistent with Sections 8(a) and 8(c) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(a) & (c). The court of appeals correctly concluded that those provisions are ambiguous with respect to the question and that HUD's interpretation is a reasonable one that is entitled to deference. Pet. App. 8a-11a. That ruling brought the Eleventh Circuit into agreement with the Eighth and Ninth Circuits. *See Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir.), *cert. denied*, 123 S. Ct. 344 (2002); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 994 (2003).

This Court denied petitions for writs of certiorari in both *Glover* and *Schuetz* that had sought review on the question of the proper interpretation of Sections 8(a) and 8(c) of RESPA with respect to the payment of yield spread premiums. Now that it is clear that the circuits are in accord on those issues, petitioners (represented by some of the same counsel who argued in *Glover* and *Schuetz* that the split in the circuits on the substance of RESPA warranted this Court's review) have shifted ground and seek to create discord where there is agreement. They contend that the question meriting the Court's review now is not the substantive issue, but whether the court of appeals was required to reject HUD's interpretation because an earlier Eleventh Circuit panel opinion understood an earlier HUD interpretation to mean something different. That issue does not warrant this Court's review. The court of appeals correctly applied the well-settled and uniformly-followed standards articulated by this Court in determining when to defer to an agency's interpretation of an ambiguous statutory provision.

STATEMENT

1. Statutory and Regulatory Framework

a. This case involves Sections 8(a) and 8(c) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2600 *et seq*. Section 8(a) of RESPA prohibits the giving or receiving of "any fee, kickback, or thing of value pursuant to any agreement or understanding * * * that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." *Id.* § 2607(a). To ensure that Section 8(a) was not read to prohibit legitimate fees, Congress qualified that prohibition with Section 8(c), which provides, in part, that "[n]othing in this section shall be construed as prohibiting * * * payment for goods or facilities actually furnished or for services actually performed." *Id.* § 2607(c)(2).

In Section 19(a) of RESPA, Congress delegated broad authority to the United States Department of Housing and Urban Development (HUD) to "prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of [RESPA]." *Id.* § 2617(a). In Section 19(b) of RESPA, Congress provided a safe harbor from liability under any of RESPA's prohibitions, including those found in Sections 8(a) and 8(c). It provides that a person is not liable under RESPA for "any act done or omitted in good faith in conformity with any rule, regulation, or interpretation" by HUD. *Id.* § 2617(b). In turn, HUD has provided that "a rule, regulation or interpretation" includes any "document that is published in the Federal Register by the Secretary and states that it is an 'interpretation,' 'interpretative rule,' 'commentary,' or a 'statement of policy' for purposes of Section 19(a)." 24 C.F.R. § 3500.4(a)(1)(ii).

b. At the time RESPA was enacted in 1974, a person who wanted to obtain a home mortgage loan was usually limited to obtaining a loan directly from a local bank or savings and loan. *See* Department of Housing and Urban Development, *Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender*

Payments to Mortgage Brokers; Final Rule, 64 Fed. Reg. 10,080, 10,080 (Mar. 1, 1999) ("1999 Statement of Policy"). Beginning in the 1980s, however, mortgage brokers began offering mortgage loans to home buyers. Mortgage brokers provide borrowers with access to a wide array of lenders and provide valuable services to both lenders and borrowers. Their "bricks and mortar" presence in a community gives lenders a low-cost way to extend their reach into new geographical markets and provides borrowers access to a more competitive marketplace. Mortgage brokers also furnish numerous services that make loan closings possible, such as creating a loan application, underwriting the loan package, and making certain the loan package is one a lender wants to fund and acquire. *Id.* at 10,080, 10,081, 10,085 (listing typical services provided). In exchange for its services, a mortgage broker is compensated by the borrower, by the lender, or by a combination of both. *Ibid.*

A borrower may choose to pay a mortgage broker's full compensation up front for facilitating the loan process. Many borrowers, however, do not have sufficient cash to cover a mortgage broker's full compensation, or do not wish to use their cash to pay the mortgage broker's compensation when that cost can be financed through the loan transaction. Such borrowers choose to finance some or all of that cost. In such circumstances, the mortgage broker's compensation can be paid by the lender. The lender, in turn, recovers this additional cost through a slightly higher interest rate, known as an "above par loan." *Id.* at 10,081 & n.2. When that occurs, the payment to the mortgage broker by the lender is referred to as a "yield spread premium."[1] HUD has explained that lender payments

[1] The range of pricing options available from a lender are published daily on rate sheets. These options include the amount the lender will pay a mortgage broker in connection with a particular loan product, credit category, loan amount, and particular rate of interest. The daily rate sheets measure the premium in relationship to the benchmark "par" interest rate. "The term 'par rate' refers to the rate offered to the broker (through the lender's price sheets) at which the

(Continued on following page)

to mortgage brokers, including yield spread premiums, "foster[ ] homeownership" by enabling borrowers to obtain loans without paying fees directly and thereby overcome "[o]ne of the primary barriers to homeownership" and refinancing – "the up front cash needed to obtain a mortgage." Department of Housing and Urban Development, *Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b); Final Rule*, 66 Fed. Reg. 53,052, 53,053, 53,054 (Oct. 18, 2001) ("2001 Statement of Policy").[2]

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lender will fund * * * of the loan with no premiums or discounts to the broker." *Id.* at 10,081 n.1. Rate sheets also typically offer "below par" loans, where the borrower must pay the lender additional money to lower the rate and the lender makes no contribution to the payment of the mortgage broker's compensation. *Ibid.*

Petitioners contend (Pet. 4) that the lenders' daily rate sheets are "presumably" kept secret to hide the yield spread premium. That is contradicted by the record below, which shows that the amount of the yield spread premium was revealed to each petitioner. Pet. App. 80a, 85a, 91a; *see also* note 5, *infra*. Indeed, each petitioner sought to define the class to be certified under Federal Rule of Civil Procedure 23(b)(3) as including only those loans where the mortgage loan documents reported that the mortgage broker was paid a yield spread premium. Pet. App. 14a-15a, 25a. In reality, lenders and mortgage brokers are prohibited from sharing rate sheets with consumers by federal law because the sheets do not satisfy federal Truth in Lending Act requirements regarding how interest rates and costs must be disclosed to borrowers. *See* 12 C.F.R. §§ 226.24(b), 226.2(a)(2).

[2] Another option available to some borrowers is to include the closing costs as part of the principal balance of the mortgage loan. As HUD has explained, however, including those costs in a mortgage loan is not an option for many borrowers because it would cause them to violate the maximum loan-to-value ratio required to qualify for the loan or to avoid costly mortgage insurance. *See* 66 Fed. Reg. at 53,054. In addition, a borrower might determine that he prefers to pay an incrementally higher interest rate (as the interest is tax-deductible) rather than increase his mortgage debt.

c. In 1998, concerned about a proliferation of lawsuits challenging the payment of yield spread premiums, Congress directed HUD to issue a policy statement to "clarify" HUD's position on the legality of lender payments to mortgage brokers under RESPA. H.R. Conf. Rep. No. 769, 105th Cong., 2d Sess. 260 (1998). Congress specified that HUD was to consult "with representatives of industry, federal agencies, consumer groups, and other interested parties," and then provide "guidance" to the courts in the form of a statement of policy to resolve any legal uncertainty about the practice. *Ibid.* HUD met with "representatives of government agencies, as well as a broad range of consumer and industry groups," and then issued in the Federal Register its 1999 Statement of Policy regarding "Lender Payments to Mortgage Brokers." 64 Fed. Reg. at 10,080, 10,084.

HUD explained in the 1999 Statement of Policy that it understood that yield spread premiums were calculated as a function of the interest rate and that it did not consider such payments from lenders "to be illegal *per se*." 64 Fed. Reg. at 10,084. HUD set forth a two-part test for determining the legality under Section 8 and its regulations of lender payments to mortgage brokers, including yield spread premiums. Under the HUD test, the threshold question is "whether there were goods or facilities actually furnished or services actually performed for the total compensation paid to the mortgage broker." *Id.* at 10,085. To facilitate that initial determination, HUD identified a typical set of compensable services and set out minimum requirements for the number and types of such services that must be performed in order to satisfy that initial step. *Ibid.* The second, and "determinative," question is whether the "total compensation" paid to the mortgage broker "is reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed." *Id.* at 10,085-10,086. The "total compensation" must be "commensurate with that amount normally charged for similar services" which "requires careful consideration of fees paid in relation to

price structures and practices in similar transactions and in similar markets." *Id.* at 10,086.

d. In 2001, the Eleventh Circuit issued its opinion in *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324 (11th Cir. 2001), *cert. denied*, 534 U.S. 1118 (2002), now known as *Culpepper III*, in which it addressed the question of the propriety of class action certification under Federal Rule of Civil Procedure 23(b)(3) in a case alleging that Section 8(a) of RESPA was violated when a particular mortgage broker had received payments directly from borrowers and also received a yield spread premium payment from a lender. 253 F.3d at 1326. The court reasoned that, in order to answer the Rule 23(b)(3) inquiry whether "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," it had "to settle on a rule of liability under § 8(a) and (c)" of RESPA. *Id.* at 1327-1328.

The court looked to HUD's 1999 Statement of Policy, which it found to be "ambiguous" with regard to its test for RESPA liability that was "the core of the class-certification dispute here." *Id.* at 1327. The court carefully reviewed the interpretations of that Statement of Policy proffered by the plaintiffs and by the defendant in that case. The court ultimately adopted the plaintiffs' construction of HUD's 1999 Statement of Policy. The court of appeals held that lender payments to mortgage brokers could be presumed to violate RESPA to the extent that the payments, analyzed in isolation, were calculated by a lender based on the interest rate on a rate sheet, rather than negotiated on a loan-by-loan basis. *See id.* at 1329-1332. Because that rule of liability did not require individualized assessments of what services were provided to each member of the class, the court concluded that class certification was appropriate. *Ibid.*[3]

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[3] *Culpepper III* also referred to that court's decisions in the case on an earlier appeal. In *Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692 (11th Cir.) (*Culpepper I*), *clarified on reh'g*, 144 F.3d 717 (1998)

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e. Following the *Culpepper III* decision, HUD issued a second RESPA Statement of Policy, entitled, in relevant part, "Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers." 66 Fed. Reg. at 53,052. HUD was concerned that *Culpepper III* would eliminate lender payments that foster homeownership for those otherwise unable to afford home financing. *Id.* at 53,054. HUD explained that this 2001 Statement of Policy's discussion of yield spread premiums and Section 8(a) was necessary to "clarify" and "eliminate any ambiguity" in its 1999 Statement of Policy. *Id.* at 53,052, 53,053. HUD explained in greater detail how yield spread premiums are necessary to enable certain borrowers to afford a home mortgage and to offer all borrowers additional financing options. *Id.* at 53,054. HUD also emphasized that it had "recognized the utility of yield spread premiums in regulations issued prior to the 1999 Statement of Policy," and pointed to regulations it had promulgated as early as 1989 and 1992. *Ibid.*

HUD's 2001 Statement of Policy indicated that its 1999 Statement of Policy had been misunderstood by the court in *Culpepper III* because *Culpepper III* focused solely on the method by which the yield spread premium is calculated (*i.e.*, that it is connected to the interest rate). HUD rejected that analysis, explaining that even where used to pay some or all of a mortgage broker's compensation,

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(*Culpepper II*), the court reversed the district court's grant of summary judgment to the defendants based on the court of appeals' conclusion that a yield spread premium could be viewed as a referral fee proscribed by Section 8(a). Noting that "the holding here is highly dependent upon the facts of this financial transaction," 132 F.3d at 697 n.5, the court remanded for further proceedings. On a petition for rehearing, the court clarified that yield spread premium payments "can in certain circumstances" be lawful under RESPA and that "[t]he only issue decided" in the *Culpepper I* opinion "was whether as a matter of law [the mortgage broker] had proved in the instant record that this yield spread premium for this table-funded loan was a payment for goods or services and therefore not a prohibited referral fee." *Culpepper II*, 144 F.3d at 718.

a yield spread premium (like any similar finance mechanism) is available to pay a mortgage broker's compensation precisely because the lender is charging additional interest. *Ibid.* HUD clarified that its two-part test did not support the court's view "that a yield spread premium can be presumed to be a referral fee based solely upon the fact that the lender pays the mortgage broker a yield spread premium that is based upon a rate sheet, or because the lender does not have specific knowledge of what services the broker has performed." *Id.* at 53,055. Regarding the latter point, HUD noted that lenders typically know the mortgage broker has performed an array of valuable services because of industry practice and underwriting standards, as well as the large volume of documentation they have received from the mortgage broker. *Ibid.* Regarding the court of appeals' focus on the calculation and rate sheet, HUD explained that, in order to determine "whether a yield spread premium was for goods, facilities or services under the first part of the HUD test," it is necessary to look beyond a rate sheet to the individual transaction and what was provided by the mortgage broker and what was paid. *Ibid.* HUD emphasized that reliance on a rate sheet "does not indicate whether a particular yield spread premium is a payment for * * * services." *Ibid.* HUD thus left no doubt that, under its interpretation of Section 8(a) of RESPA, "[t]he legality of any yield spread premium can only be evaluated in the context of the test HUD established and the specific factual circumstances applicable to each transaction in which a yield spread premium is used." *Id.* at 53,054.[4]

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[4] HUD's interpretation is consistent with the view of the vast majority of district courts that have correctly determined the appropriate test for liability under Section 8(a) both prior to and after the issuance of HUD's 1999 Statement of Policy. *See, e.g., Schmitz v. Aegis Mortgage Corp.*, No. 97-2142, 1998 U.S. Dist. LEXIS 22736, at *10-*11 (D. Minn. Aug. 3, 1998) (so holding and collecting cases).

2. Proceedings Below

a. District Court

i. Petitioners Daniel and Emily Heimmermann were interested in buying their first home, but had little money for a down payment and closing costs. They worked with a mortgage broker to obtain a mortgage with low up front costs. Based on a wide variety of factors, the mortgage broker elected to obtain that loan for the borrowers from respondent First Union Mortgage Corporation. At the time of settlement, the mortgage broker was paid a yield spread premium by First Union Mortgage Corporation. The Heimmermanns were put on plain notice in the contract with their mortgage broker, as well as in the mortgage documents presented to them at closing, of the lender's payment to the mortgage broker. Pet. App. 80a; No. 99-14066 C.A. Supp. Rec. Tab 47, Exh. E ("I/We understand and agree that [the mortgage broker] will perform a good and valuable service and may be compensated accordingly. This compensation may or may not be in the form of *** a yield spread premium paid by the investor purchasing the loan.").

The Heimmermanns later filed suit in the United States District Court for the Northern District of Alabama against First Union Mortgage Corporation, claiming that the yield spread premium payment violated Section 8(a) of RESPA. Pet. App. 14a-15a. The Heimmermanns filed a motion for certification of a plaintiff class. The district court granted the motion, finding that common questions of fact predominated. *Id.* at 17a-21a.

ii. Petitioner Beth Richardson and petitioners Pamela and David Hirsch each used the services of a mortgage broker to obtain a home mortgage loan from respondents BankAmerica Corporation, Bank of America FSB, and BankAmerica Mortgage (BankAmerica). Pet. App. 24a-25a. At the time of settlement for each of their

home purchases, the mortgage broker was paid a yield spread premium by BankAmerica. Richardson and the Hirschs were put on plain notice of that payment. *Id.* at 91a, 85a.[5]

Richardson and the Hirschs later filed separate lawsuits in two different federal district courts in Georgia against BankAmerica, claiming that the yield spread premium payment to their mortgage brokers violated Section 8(a) of RESPA. Pet. App. 24a-25a. The cases were consolidated and the district court denied plaintiffs' motion for certification of a class in both suits. *Id.* at 24a. It concluded that class certification was not appropriate because individual factual questions would predominate over any questions common to the proposed class. *Id.* at 26a-27a.[6]

b. Court of Appeals

i. The court of appeals reversed the district court's order granting class certification in the *Heimmermann* case. Pet. App. 1a-11a. The court ruled that the district court had applied the wrong legal standard when it certified the class, and that the court should defer to HUD's interpretation of Section 8(a) set forth in its 2001

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[5] Contrary to petitioners' suggestion (Pet. 4-5 & n.5), the yield spread premium was disclosed to petitioner Richardson on Line 811 of the settlement statement received at closing in the manner mandated by HUD and BankAmerica policies. *See* App., *infra*, 6a n.8. For a discussion of other factual inaccuracies that have been suggested by petitioners, see No. 99-11554 Resp. C.A. Br. 7-10, 12, 17-20.

[6] In March 2000, the district court entered summary judgment for BankAmerica on the Hirschs' individual claims, holding that they had failed to demonstrate a genuine issue of fact as to the mortgage broker's actual provision of valuable goods and services or the reasonableness of the compensation for those services. The district court also ruled, in the alternative, that the suit was barred by RESPA's one-year statute of limitations. On April 23, 2003, the court of appeals affirmed the district court's ruling on the merits. *See* App., *infra*, 1a-7a. The Hirschs' petition for rehearing and rehearing *en banc* is currently pending.

Statement of Policy. In reaching that conclusion, the court expressly recognized that "[n]o deference is to be given to an agency interpretation that is at odds with the plain meaning of the statute being interpreted." Pet. App. 5a (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The court explained, however, that "RESPA does not, by its plain language, speak to the standard for determining whether the payment of a [yield spread premium] violates the Act." *Ibid.* The court of appeals then held that HUD's 2001 Statement of Policy interpreting Section 8(a) was "entitled to deference as an interpretation of RESPA." *Id.* at 9a n.7; *id.* at 5a ("plain language of RESPA does not prevent [court] from giving deference to the 2001 [Statement of Policy]"). The court also noted that both the Eighth and Ninth Circuits had concluded that the 2001 Statement of Policy "is not inconsistent with the plain language of [Section 8(a) of] RESPA" and that HUD's two-part test set forth in its 2001 Statement of Policy "is fully consistent with RESPA." *Id.* at 5a n.5 (citing *Glover v. Standard Fed. Bank*, 283 F.3d 953, 963-965 (8th Cir.), *cert. denied*, 123 S. Ct. 344 (2002); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 994 (2003)).

The court of appeals rejected petitioners' various arguments as to why it should not apply HUD's 2001 Statement of Policy to the case. Pet. App. 3a-11a. The court emphasized that the 2001 Statement of Policy did not create a new rule, "but instead only clarified the interpretation of RESPA" found in HUD's 1999 Statement of Policy. *Id.* at 4a. The court also noted that Congress had included in Section 19(a) of RESPA, 12 U.S.C. § 2617(a), "an express delegation of congressional authority" to HUD to issue "interpretations" of ambiguous provisions of RESPA, and that HUD had expressly invoked that authority in issuing the 2001 Statement of Policy interpreting Section 8(a). Pet. App. 6a-7a. The court agreed with the Ninth Circuit's ruling in *Schuetz* that because Section 8(a) was ambiguous with respect to the question at issue, *Chevron* deference was warranted. *Id.* at 9a & n.7. The court also expressly found that HUD's 2001 Statement of Policy is not inconsistent

with the agency's 1999 Statement of Policy or prior agency guidance on the issue, *see id.* at 5a, 7a-9a, and that the other administrative materials cited by petitioners merely "reflect the ambiguity [the court] saw in the 1999 [Statement of Policy]." *Id.* at 7a.

Finally, the court of appeals directly addressed its decision in *Culpepper III* on which petitioners relied, and which was decided by the same panel of judges as the instant case. The court recognized that HUD's clarification in its 2001 Statement of Policy "compels a different result in this case than the result in *Culpepper III*." Pet. App. 9a. The court explicitly held that it was appropriate to defer to the clarification in HUD's 2001 Statement of Policy notwithstanding that such deference would, "in effect, overrule the holding of *Culpepper III*," *ibid.*, because, in reaching its holding in *Culpepper III*, the court of appeals had not "purport[ed] to rely squarely upon the plain language of Section 8 of RESPA, but rather upon an *interpretation* of RESPA's language and of the 'ambiguous' 1999 [Statement of Policy]." *Id.* at 5a; *see id.* at 3a (noting that its "ruling in *Culpepper III* had relied heavily on the 1999 [Statement of Policy]," which was "'ambiguous' and subject to different interpretations"). The court recognized that "[t]he resolution of ambiguity in a statutory text is often more a question of policy than of law," and that a court's preference for a different interpretation "is not enough to deny deference to the agency interpretation." *Id.* at 8a.

Because the court of appeals' adoption of HUD's two-part test meant that individualized assessments are required of what services were provided to a borrower and whether the total amount of mortgage broker compensation was reasonable in the light of the circumstances of a particular loan, the court concluded that class certification under Rule 23(b) was error. Pet. App. 10a-11a. Petitioners' petition for rehearing *en banc* was denied without dissent. *Id.* at 29a-30a.

ii. In a separate *per curiam* opinion by the same panel of judges, the court affirmed the district court's

denial of class certification in the suits brought by petitioners Richardson and the Hirschs, citing its *Heimmermann* opinion. Pet. App. 12a-13a. Petitioners' petition for rehearing *en banc* was denied without dissent. *Id.* at 31a-32a.

SUMMARY OF ARGUMENT

Joining the Eighth and Ninth Circuits, the Eleventh Circuit properly determined in these cases that Sections 8(a) and 8(c) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(a) & (c), are ambiguous with respect to the question of how yield spread premium payments by lenders to mortgage brokers are to be treated and that the interpretation promulgated by the United States Department of Housing and Urban Development (HUD) in its 2001 Statement of Policy is a reasonable one that is entitled to deference. *See* Pet. App. 8a-11a. Plaintiffs in the cases from both the Eighth and Ninth Circuits already sought this Court's review of that issue. *See Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir.), *cert. denied*, 123 S. Ct. 344 (2002); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 994 (2003). The Court denied review in both cases, and there is no reason for a different result here.

A. In order to overcome that obstacle to review by this Court, petitioners attempt to shift ground, claiming that the decisions below, which aligned the court of appeals' holding on the meaning of Sections 8(a) and 8(c) of RESPA with the holdings of the other circuits, at the same time created a circuit split on a question of administrative deference. Petitioners claim that review by this Court is warranted because the decisions below conflict with decisions by this Court and other circuits that have declined to defer to an agency interpretation that would overrule a statutory interpretation precedent. Pet. i; *id.* at 12-26. The decisions on which petitioners rely, however, all involved prior judicial determinations of the clear meaning of the relevant statutory provisions. Here, by contrast, the

court of appeals deferred to a clarifying interpretation by HUD of Sections 8(a) and 8(c) of RESPA, statutory provisions that the court (and every other court of appeals to consider the matter) has found to be ambiguous with respect to the question at issue.

B. Petitioners also appear to challenge the court of appeals' own characterization of the basis for its earlier panel decision, suggesting that the earlier decision was based on the clear meaning of the statute, despite the court of appeals' express statements to the contrary. Pet. 15-16. That challenge is not worthy of this Court's review, particularly where the same panel of judges who decided the instant cases issued the earlier decision and the full court of appeals had an opportunity to vote on two petitions for rehearing *en banc* and neither petition garnered a single vote. Pet. App. 29a-30a, 31a-32a. In any event, even if there were improper reasoning in the decision below, the erroneous reasoning of an opinion does not, alone, warrant exercise of this Court's review. *See Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) (this Court "reviews judgments, not statements in opinions").

The court of appeals' deference to HUD's clarified interpretation was wholly appropriate because the court found it to be a reasonable interpretation of an ambiguous statutory provision. Even if the court's deference meant that it was adopting a different agency interpretation than the court had adopted in its earlier decision, that deference would be consistent with the Court's repeated recognition that, when provisions such as Sections 8(a) and 8(c) are ambiguous with respect to the question at issue, an agency may adopt different interpretations over time and each agency interpretation is entitled to deference and should be sustained so long as it is reasonable. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417-418 (1993).

C. To the extent the petition could be construed to seek review of the question whether the agency's interpretation warrants administrative deference by the courts,

that issue is not fairly encompassed within the question presented and, in any event, does not merit review because the court of appeals' holding is correct and consistent with the result reached by the other circuits that have addressed the question. *See Glover*, 283 F.3d 953; *Schuetz*, 292 F.3d 1004; Pet. 11 (acknowledging agreement among circuits).

Finally, petitioners' claim that the decisions below conflict with *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002), *pet. for cert. filed*, No. 02-1430 (Mar. 26, 2003), is incorrect. That case, involving a different provision of RESPA, declined to defer to a different portion of HUD's 2001 Statement of Policy after determining that the statutory provision at issue in that case is unambiguous and thus does not require recourse to agency interpretation to determine its meaning.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Decisions Below Are Not Contrary To This Court's Decisions Involving Judicial Readings Of Unambiguous Statutes

1. The decisions below are not contrary to this Court's precedents. Petitioners' reliance (Pet. 12-16) on *Neal v. United States*, 516 U.S. 284 (1996), *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *Maislin Industries, Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), to claim otherwise is misplaced. In those cases, the Court refused to defer to a changed agency interpretation because it was inconsistent with the Court's prior determination of the relevant "statute's clear meaning." *Maislin*, 497 U.S. at 131 (quoted in *Lechmere*, 502 U.S. at 536-537, and cited in *Neal*, 516 U.S. at 295). The Court rejected the subsequent agency interpretations of the statutes because the Court's prior decisions addressing the question of statutory interpretation had previously found no ambiguity in the statutes with respect to the specific issue. Those decisions are consistent with the recognized limitation on administrative deference under *Chevron*, because "[i]f the

intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843.

Specifically, in *Neal*, the Court rejected an agency interpretation that would have required overruling *Chapman v. United States*, 500 U.S. 453 (1991), which had interpreted a statute based on the "ordinary meaning" of the statute's terms. *Neal*, 516 U.S. at 289; *see also Chapman*, 500 U.S. at 463-464 (relying on a "straightforward reading" of the text and structure that did not leave the Court "with an ambiguous statute"). In *Lechmere*, the Court explained that it was rejecting the agency's current interpretation because the Court's prior decision had determined the clear meaning of the statute and thus had concluded, "in *Chevron* terms," that the statute "speaks to the issue." 502 U.S. at 537. And in *Maislin*, likewise, the Court rejected the agency's claim to *Chevron* deference on the ground that the agency's interpretation "permitted the very price discrimination that the Act *by its terms* seeks to prevent." 497 U.S. at 130 (emphasis added); *see also id.* at 136 (Scalia, J., concurring).

Chevron makes equally clear, however, that if a "statute is silent or ambiguous with respect to the relevant issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Because "the resolution of ambiguity in a statutory context is often more a question of policy than of law," *Pauley v. BethEnergy Mines, Inc.*, 501 U.S 680, 696 (1991), the agency has the discretion to alter its interpretation of the ambiguous terms over time. *Chevron* expressly rejected the authority of a court to adopt a "static judicial definition" of a statutory term once it determined "that Congress itself had not commanded that definition." 467 U.S. at 842; *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (a change in position "is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency").

Although petitioners attempt to bring the decisions below within the reach of the *Neal* rule, they can only do so by mischaracterizing the reasoning and holding of the court of appeals.[7]

2. Petitioners assert that the court of appeals below held that it was required to overrule circuit precedent that was based on the "clear language * * * of the statute," Pet. i; *see also* Pet. 19-27, because it had to defer to a newly promulgated agency interpretation of a statute. In the instant cases, however, the court of appeals determined that the relevant statutory provisions – Sections 8(a) and 8(c) of RESPA – have no "*clear meaning*" with respect to the question at issue. Pet. App. 9a (quoting *Lechmere*, 502 U.S. at 536-537). The court found the statute is ambiguous, and does not provide any guidance on how the prohibition contained in Section 8(a), 12 U.S.C. § 2607(a), is to be reconciled with the savings language in Section 8(c), 12 U.S.C. § 2607(c), with regard to payments in the mortgage broker industry, such as yield spread premiums, that developed years after the enactment of the statute. Thus, the court of appeals properly deferred to HUD's 2001 Statement of Policy clarifying its 1999 Statement of Policy that interpreted the ambiguous Sections 8(a) and 8(c), because the court found HUD's interpretation, as clarified, to be a reasonable interpretation. Pet. App. 8a-9a.

Petitioners argue (Pet. 15-16) that the court of appeals' earlier decision in *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324 (11th Cir. 2001), *cert. denied*, 534 U.S. 1118 (2002) (*Culpepper III*), interpreting Section 8(a) embodied a holding that the statutory text was clear and that its reading of the statute was the *only* proper reading. The panel below, composed of the same members of the

[7] Furthermore, it is not clear that the *Neal* rule should even apply to the decision by a court of appeals whether, or through what procedure, to depart from one of its earlier decisions, because that question normally is left to each court of appeals to decide. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

court who decided *Culpepper III*, and including one member of the panel that decided the earlier *Culpepper* decisions, did not read that decision in that manner. Instead, the court of appeals made clear that its earlier decisions did "not purport to rely squarely upon the plain language of Section 8 of RESPA." Pet. App. 5a. At no point in *Culpepper III* (or in the earlier *Culpepper* decisions) did the court of appeals purport to determine that Section 8(a) was unambiguous. Indeed, the court of appeals already had concluded in *Culpepper III* that RESPA was ambiguous with respect to the question at issue and had thus focused on the parties' arguments regarding the agency's 1999 Statement of Policy. That conclusion about Sections 8(a) and 8(c) being ambiguous on this issue is consistent with every other court of appeals that has addressed the matter. *See Glover*, 283 F.3d at 961; *Schuetz*, 292 F.3d at 1012; *see also O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 739 (5th Cir. 2003).[8]

Petitioners claim that the court of appeals misread its own prior decisions in *Culpepper*. Pet. 15 (characterizing court of appeals' decision as "simply mumbo jumbo"). But the best interpreter of what an Eleventh Circuit opinion means is, of course, the Eleventh Circuit. *Cf. Fiore v. White*, 531 U.S. 225 (2001) (accepting Pennsylvania Supreme Court's explanation of what its earlier opinion meant). To the extent further confirmation is required, it is notable that, even prior to the Eleventh Circuit decisions under review here, the Eighth Circuit had read the

[8] Petitioners do not appear to argue that the court of appeals' conclusion that Sections 8(a) and 8(c) are ambiguous with respect to the question at issue is wrong. They appear to argue (Pet. 22 n.18) only that the court of appeals had previously held to the contrary and erred by reaching a different conclusion without rehearing the case *en banc*. We note that this Court has twice denied petitions for certiorari that have sought review of rulings that deferred to HUD's interpretation and had correctly found Sections 8(a) and 8(c) to be ambiguous with respect to the question at issue. *See* pages 22-23, *infra*.

Eleventh Circuit's *Culpepper* decisions in the same manner. *See Glover*, 283 F.3d at 964 n.9 ("The Eleventh Circuit appears * * * to have given at least some deference to HUD policy pronouncements."); *see also O'Sullivan*, 319 F.3d at 740 ("From the 1999 Policy Statement's two-part test, *Culpepper* interpreted the term 'for the compensation paid' as requiring the defendants to tie the disputed fee to specific goods or services provided by the broker."). Thus there is no basis to impugn the Eleventh Circuit's description of its own prior decisions.

Petitioners contend (Pet. 24, 27) that, because the court of appeals cited its decision in *Satellite Broadcasting and Communications Ass'n of America v. Oman*, 17 F.3d 344 (11th Cir. 1994), the court of appeals must have overridden circuit precedent that had previously determined that a statute had a clear meaning. But *Satellite Broadcasting* did not involve reliance on an agency interpretation to overrule a prior precedent regarding the clear meaning of a statute. The court there explained that its earlier decision, made in the absence of any regulation, had relied "upon inferences drawn from the statutory scheme and upon [its] policy determination" to conclude that satellite carriers were "cable systems" under the pertinent statute. *Id.* at 348. The court explained that, because it had not rested its decision "upon the statute's 'clear meaning,'" it was "not precluded from revisiting [its] initial interpretation of the regulatory scheme" in light of new regulations. *Ibid.* (quoting *Lechmere*, 502 U.S. at 536-537 (quoting *Maislin*, 497 U.S. at 130)). Thus, the court of appeals below correctly cited *Satellite Broadcasting* to support its determination that deference was due here. Pet. App. 9a.[9]

[9] Indeed, although petitioners claim (Pet. 24) that *Satellite Broadcasting* embodies a "general rule" that courts must "overrule a statutory interpretation decision in light of a subsequently issued agency interpretation," the Hirsch petitioners are currently arguing to the Eleventh Circuit, in their pending petition for rehearing *en banc*

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Finally, the Heimmermann petitioners argued in their petition for rehearing *en banc* that the panel below mischaracterized the prior *Culpepper* decisions. *See* No. 99-14066 Pet. for Reh'g *En Banc* 11-14. No member of the court of appeals voted for rehearing *en banc*. Pet. App. 29a-30a; *see also id.* at 31a-32a (no member voting for rehearing *en banc* from the class action decision involving Richardson and the Hirschs). The full court of appeals' willingness to permit the decisions below to take effect suggests that no member of that court believed that the case posed a threat to the uniformity of the court's decisions. *Cf.* Fed. R. App. P. 35(a)(1) (no *en banc* rehearing unless "en banc consideration is necessary to secure or maintain uniformity of the court's decisions"). There is thus no reason for this Court to intervene in order to determine whether the court of appeals properly construed its own precedents. *Cf. Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("[D]oubt about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification. It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

B. There Is No Disagreement Among The Courts Of Appeals Regarding Whether A Court Should Defer To A Clarifying Agency Interpretation Of An Ambiguous Statutory Provision That Departs From A Prior Interpretation

Petitioners have not identified any division in the circuits on the appropriate judicial treatment of clarifying guidance by an agency charged with issuing regulations

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from the panel opinion affirming the dismissal of their individual claims (*see* note 6, *supra*), that *Satellite Broadcasting* "does not support the panel's overruling of *Culpepper III*" because, in *Satellite Broadcasting*, the agency was simply "engaging in the kind of administrative action normally associated with *Chevron* deference – construing a term in a statute it administers." No. 00-11837 Pet. for Reh'g *En Banc* 12.

and interpretations of a statute where the statute is ambiguous with respect to the question at issue. The courts of appeals agree that a court should defer to an agency's clarifying interpretation of an ambiguous statute, even when it departs from the interpretation in prior court precedent, so long as the current administrative interpretation is reasonable.

Indeed, petitioners concede that there is agreement among the courts of appeals that a court may defer to an intervening agency interpretation of an ambiguous statute "where the prior [court of appeals] decision deferred, at *Chevron* step two, to an agency interpretation that has since been changed." Pet. 23; *see also id.* at 23-24 (citing cases); *C.E.K. Indus. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350, 357 (1st Cir. 1990); *Grocery Mfg. of Am. v. Gerace*, 755 F.2d 993, 1000-1001 (2d Cir.), *aff'd mem.*, 474 U.S. 801 (1985); *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB,* 843 F.2d 770, 779-780 (3d Cir. 1988); *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1123 n.8 (6th Cir. 1997); *NLRB v. Bufco Corp.*, 899 F.2d 608, 610-611 (7th Cir. 1990); *Norwest Corp. v. Commissioner*, 69 F.3d 1404, 1408-1409 (8th Cir. 1995); *National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs,* 260 F.3d 1365, 1374 & n.7 (Fed. Cir. 2001). Thus, the court of appeals properly deferred to the intervening agency interpretation in the instant cases.

This is not, as petitioners suggest (Pet. 27-29), judicial abdication to executive branch officials. Instead, the result flows directly from *Chevron.* As Justice Scalia noted in his dissent in *United States v. Mead Corp.*, 533 U.S. 218, 248 (2001), "[u]nder *Chevron* proper, when the agency's authoritative interpretation comes within the scope of that ambiguity – and the court therefore approves it – the agency will not be 'overruling' the court's decision when it later decides that a different interpretation (still within the scope of the ambiguity) is preferable." *See also* T. Merrill & K. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 916 (2001) ("At least if the issue is one as to which the statute admits of more than one meaning, then the agency

interpretation logically should take precedence over the judicial interpretation.").

C. The Question Whether Deference Is Owed HUD's 2001 Statement Of Policy Does Not Warrant Review

1. Petitioners appear at one point to raise an issue regarding the level of deference to which the portion of HUD's 2001 Statement of Policy that addresses Section 8(a) of RESPA is entitled. Pet. 16-18. Their own acknowledgment that the appropriate level of deference owed HUD's Statement of Policy should be identified necessarily means that the statute is ambiguous because otherwise the agency interpretation is owed no deference.

In any event, it is the text of the Question Presented, and not the discussion in the body of a petition, that determines the scope of the Question Presented. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 31 n.5 (1993). Although not a model of clarity, petitioners' Question Presented in these cases is limited to the purported "conflict with seven other circuits that have denied agencies the authority to use policy pronouncements to overrule circuit precedent," Pet. i, and does not present the question of what level of deference is due HUD's 2001 Statement of Policy. This becomes particularly clear when compared with the petitions for certiorari filed by plaintiffs (represented by some of the same counsel as the petitioners in these cases) in two earlier cases under Section 8(a) that expressly presented the question of what deference is owed HUD's Statement of Policy. *See* Pet. for Cert. i, *Glover v. Standard Fed. Bank*, 123 S. Ct. 344 (2002) (No. 01-1648) (Question 2); Pet. for Cert. i, *Schuetz v. Banc One Mortgage Corp.*, 123 S. Ct. 994 (2003) (No. 02-709).[10] As already noted, this Court has twice denied

[10] Indeed, arguments opposing deference would be contrary to the position of Richardson and the Hirschs below, where they urged the

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certiorari on that question. *See* page 13, *supra*. Nothing has changed since those petitions were denied that would warrant a different result in these cases.

2. In any event, petitioners' objections to the deference accorded HUD's 2001 Statement of Policy are unwarranted. As an authoritative interpretation by the agency charged by Congress with interpreting RESPA, HUD's interpretation of Section 8(a), itself ambiguous with respect to the question of yield spread premiums, was properly found by the court of appeals to be entitled to deference, Pet. App. 5a-9a, and that reasoning would support affirmance of the judgment by the Court.

Relying on language from *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), petitioners attempt to challenge that deference, first contending (Pet. 16-17) that deference is never permitted when questions of interpretation arise in a private right of action. *Adams Fruit* did not set forth such a rule, but held only that an agency interpretation could not compel a court to hold that a federal remedy was preempted by state law. *See Adams Fruit Co.*, 494 U.S. at 650. The Court emphasized that such a jurisdictional determination was the province of the courts. *See ibid.* Here, HUD's Statements of Policy did not seek to withdraw an individual's federal cause of action, but simply made clear the agency's view about how to determine in what circumstances a yield spread premium violates Sections 8(a) and 8(c). This is a situation in which the Court has consistently granted deference to an agency's reasonable interpretation of an ambiguous statutory provision, including when the issue arises in the context of a private suit. *See, e.g.*, *Chevron U.S.A. Inc. v. Echazabal*,

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court of appeals to give "considerable deference" to a letter from the General Counsel of HUD written to a member of Congress. No. 99-11554 C.A. Reply Br. 9 n.4 (quoting *Herman v. NationsBank*, 126 F.3d 1354, 1363 (11th Cir. 1997) (granting *Chevron* deference to agency's "official position" regarding the meaning of a statute embodied in a letter but not reflected in "formal regulations")).

536 U.S. 73, 84 (2002) (deferring to agency's regulation); *Smiley*, 517 U.S. at 741 (deferring to agency's litigation-inspired regulation); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567-568 (1980) (deferring to agency letters).

Under the HUD interpretation of RESPA adopted by the court of appeals, plaintiffs must demonstrate that the total compensation to the mortgage broker was unreasonable in light of the services performed. *See* App., *infra*, 6a. It remains the exclusive province of the courts to determine whether a plaintiff has proffered sufficient evidence to survive summary judgment or whether class certification under Federal Rule of Civil Procedure 23 is appropriate in a particular case.

Moreover, unlike the statute at issue in *Adams Fruit*, which delegated no relevant regulatory authority to the agency, RESPA expressly delegates to HUD, through its Secretary and other Senate-confirmed officials (such as the Assistant Secretaries who signed the Statements of Policy), the broad authority to issue regulations and interpretations of the relevant statutory provision. *See* 12 U.S.C. § 2617(a). Therefore, this Court's holding in *Adams Fruit* does not present any impediment to the court of appeals deferring to HUD's clarified test for liability under Sections 8(a) and 8(c).

3. Petitioners also claim (Pet. 17-18) that *Chevron* deference to HUD's 2001 Statement of Policy is not appropriate because it was not promulgated pursuant to notice-and-comment rulemaking. To support that claim, petitioners rely on language in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). This Court rejected that understanding of *Christensen* in *Barnhart v. Walton*, 535 U.S. 212 (2002). "[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due. If this Court's opinion in *Christensen* * * * suggested an absolute rule to the contrary, our later opinion in *United States v. Mead Corp.*, 533 U.S. 218 (2001), denied the suggestion." *Id.* at 221-222 (some citations omitted). This

is not to say that all agency policy statements are entitled to *Chevron* deference. *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S. Ct. 1673, 1680 n.9 (2003).[11] Under the standards articulated in *Mead* and *Barnhart*, whether an agency's interpretation of a statute, including in a statement of policy, is entitled to *Chevron* deference depends first on the statute being ambiguous with respect to the question at issue and, if ambiguous, on an array of factors, including the expertise of the agency, the care the agency has given the question, the consistency of its interpretation, and the method Congress intended the agency to use to express its interpretations. *See Barnhart*, 535 U.S. at 219-220, 222.

In the instant cases, the court of appeals properly relied upon several factors in determining that HUD's 2001 Statement of Policy warranted deference with respect to the determination of the validity of yield spread premiums under Section 8(a) of RESPA. The court found that the reasoning of the 2001 Statement of Policy regarding Section 8(a) reflects a careful consideration of an issue that is closely related to the expertise of the agency. Pet. App. 8a; *see also Schuetz*, 292 F.3d at 1014 ("HUD has not exceeded its area of expertise"); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002), *pet. for cert. filed*, No. 02-1430 (Mar. 26, 2003) (dictum) (in contrast to a portion of the 2001 Statement of Policy's cursory treatment of another

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[11] In *Clackamas*, the United States "acknowledged" that the agency manual at issue was not entitled to *Chevron* deference. *Ibid.* Contrary to petitioners' suggestion (Pet. 18), the United States has not indicated that HUD's Statements of Policy are not entitled to *Chevron* deference. In the case cited by petitioners (issued only a month after this Court issued its *Chevron* decision), the Sixth Circuit noted that the government had contended in a criminal prosecution under RESPA that "although not binding, the administrative interpretations [issued pursuant to Section 19(a) of RESPA] are entitled to deference and should be followed in the absence of compelling indications that the interpretations are wrong." *United States v. Graham Mortgage Corp.*, 740 F.2d 414, 421-422 (6th Cir. 1984).

issue under a different provision of RESPA, "both [the 1999] statement and a portion of the 2001-1 statement * * * that further addressed the issue of yield-spread premiums contain a full discussion of that issue"). Also, the portion of the 2001 Statement of Policy concerning Section 8(a) is consistent with earlier agency interpretations. Pet. App. 7a-8a; *see also Schuetz*, 292 F.3d at 1013-1014 (same). Moreover, both the 1999 and 2001 Statements of Policy regarding Section 8(a) were issued only after consultation with consumer and industry representatives. *See* 64 Fed. Reg. at 10,084 ("in developing this [1999] policy statement, HUD met with representatives of government agencies, as well as a broad range of consumer and industry groups"); *Martinez Moves to Protect Homebuyers; Calls for Simplified Process*, HUD News Release No. 01-105 (Oct. 15, 2001) (announcing that it "met with members of the mortgage industry and consumer advocates before deciding upon the [2001 Statement of Policy]"), *available at* www.hud.gov/news/release.cfm?content =pr01-105.cfm.[12]

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[12] Petitioners imply that HUD's 2001 Statement of Policy should not be entitled to deference because, they contend, HUD "subsequently admitted" that the Statement was "the result of a deal with the [mortgage] industry." Pet. 10, 19 n.15. Not surprisingly, the HUD document relied on for that proposition does not contain such an admission. The document states that "representatives of the mortgage industry urged HUD to issue a clarification of its 1999 Statement of Policy," and that they "assured the Department [in letters] that following a clarification by HUD, they also would support a HUD rule requiring improved fee disclosure." 67 Fed. Reg. 49,143 (2002). It does not say, as petitioners suggest, that this offer resulted in HUD issuing the Statement of Policy.

In addition, respondents do not accept the authenticity of the extra-record materials submitted by petitioners, nor their speculation as to the authorship of those extra-record materials. Pet. App. 112a-148a. In any event, a comparison between petitioners' extra-record materials and the 2001 Statement of Policy actually issued by HUD demonstrates that those materials apparently did not control either the specific language or the format of the agency's interpretation. *Compare id.* at 116a, 135a, 136a (recommending that HUD remove language "for the

(Continued on following page)

Finally, Congress specifically prohibited imposing liability under RESPA on persons who act "in good faith in conformity with any rule, regulation, *or interpretation* thereof by the Secretary [of HUD] or the Attorney General." 12 U.S.C. § 2617(b) (emphasis added). Congress thus envisioned that HUD interpretations, whether or not issued through notice-and-comment rulemaking, could change the legal rights of the public. As this Court explained with regard to a virtually identical provision in the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, "[t]hat statutory provision signals an unmistakable congressional decision to treat administrative rulemaking *and interpretation* under TILA as authoritative" when a court is faced with "an apparent lacuna in the express prescriptions of TILA." *Milhollin,* 444 U.S. at 567-568, 570 (emphasis added). Indeed, it was Congress that spurred HUD to issue a Statement of Policy on the interpretation of Sections 8(a) and 8(c) at issue in these cases. *See* H.R. Conf. Rep. No. 769, 105th Cong., 2d Sess. 260 (1998) (instructing HUD to issue a "policy statement * * * clarify[ing] its position on lender payments to mortgage brokers within 90 days"). By explicitly directing an agency to provide guidance on the precise question and in a particular format, Congress indicated that it expected HUD's Statement of Policy concerning yield spread premiums and Section 8(a) to carry weight. *Cf. Rostker v. Goldberg*, 453 U.S. 57, 74 (1981) (a conference report adopted by both Houses "is considerably more significant than a typical report of a single House, and its findings are in effect findings of the entire Congress").[13]

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compensation paid" and "for the total compensation paid" from the Statement of Policy), *with* 66 Fed. Reg. at 53,053, 53,054, 53,056 (retaining the language that had been recommended for deletion).

[13] These factors would also support deference under the alternative argument pressed below (but not reached by the court of appeals, *see* Pet. App. 9a n.7), that HUD's 2001 Statement of Policy regarding yield spread premiums would be entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Even if HUD's 2001 Statement of Policy regarding Sections 8(a) and 8(c) is not entitled to deference under *Chevron*, petitioners do not address the alternative ground for upholding the court of appeals' decision, pressed below (although not reached by that court, *see* Pet. App. 9a n.7) and adopted by the Eighth Circuit in *Glover*, that the Statement of Policy regarding yield spread premiums would be entitled to deference as a reasonable construction of HUD's own ambiguous regulations implementing those provisions. Since *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), this Court has consistently held that an agency interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Accord Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993) (collecting cases). The agency's interpretation of its own regulation need not be executed in any particular manner to be entitled to deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to agency's construction of regulations expressed in *amicus* brief). Indeed, the Eighth Circuit has concluded that HUD's 2001 Statement of Policy regarding yield spread premiums was "controlling authority" because it reasonably interpreted HUD's own regulations. *See Glover*, 283 F.3d at 962; *cf. Krzalic*, 314 F.3d at 882 (Easterbrook, J., concurring) (dictum) (noting independent basis of *Glover*'s deference).

4. Petitioners seek (Pet. 25-26) to manufacture a split regarding deference to HUD's interpretation of Sections 8(a) and 8(c) in the 2001 Statement of Policy by mischaracterizing the decision of the Seventh Circuit in *Krzalic*, 314 F.3d 875. *Krzalic* declined to defer to the portion of HUD's 2001 Statement that sought to interpret a different provision of RESPA – Section 8(b), which prohibits giving or accepting "any portion, split, or percentage of any charge." 12 U.S.C. § 2607(b). The Seventh Circuit reached that conclusion because it found that the text of Section 8(b) was unambiguous with respect to the issue before it – whether Section 8(b) requires an actual split or apportioning of fees in order to show a violation –

and could not be read to prohibit conduct where the fee was not split with a third party, as urged by HUD in the 2001 Statement of Policy. 314 F.3d at 879. Because the Seventh Circuit found that the "statutory provision is clear on its face" with respect to the fee split requirement, *ibid.*, that portion of the 2001 Statement of Policy could not satisfy the precondition for deference articulated in *Chevron*, and the *Krzalic* court thus correctly declined to accord it deference. *See also id.* at 881 (finding no "play in the statutory joints").[14] That conclusion is in accord with other circuits that have addressed the meaning of Section 8(b) and found it to be unambiguous. *See Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 267 (4th Cir. 2002) (refusing to defer to portion of HUD's 2001 Statement of Policy because Section 8(b) unambiguous); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 838-839 (8th Cir. 2003) (same).

By contrast, as set forth above, the courts of appeals are in agreement that Sections 8(a) and 8(c) of RESPA, 12 U.S.C. § 2607(a) & (c), which are at issue in the instant cases, are ambiguous with respect to the question at issue here. Petitioners argue that the contrast between *Krzalic* and the cases below "could not be starker." Pet. 26. But in each case the courts of appeals employed similar analyses and correctly reached different results because one provision was determined to be unambiguous, but the other ambiguous.

Review by this Court of these questions, which have generated no division in the results reached by the various courts of appeals, is not warranted.

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[14] The extended discussion in *Krzalic* about the level of deference to which the 2001 Statement of Policy would be entitled was *dictum*, as the concurrence noted. *See* 314 F.3d at 883 (Easterbrook, J., concurring) (clear statutory text makes majority's discussion of *Chevron* "by the by").

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 27, 2003

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11837

D.C. Docket No. 98-01032 CV-0DE-1

PAMELA C. HIRSCH, individually, and on behalf of all others similarly situated, DAVID L. HIRSCH,

Plaintiffs-Appellants,

versus

BANKAMERICA CORPORATION, a Delaware corporation, BANK OF AMERICA FSB, INC., a Hawaii corporation, BANKAMERICA MORTGAGE, a division of BankAmerica FSB, a Hawaii corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(April 23, 2003)

Before EDMONDSON, Chief Judge, COX and GIBSON*, Circuit Judges.

PER CURIAM:

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* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

In this RESPA case, Plaintiffs Pamela and David Hirsch appeal the district court's grant of summary judgment to defendants BankAmerica Corp. and Bank of America FSB (collectively "Bank of America"). We affirm.

This case is one of several dealing with the legality of the payment of Yield Spread Premiums (YSPs) by mortgage lenders to mortgage brokers. In *Heimmermann v. First Union Mort. Corp.*, 305 F.3d 1257 (11th Cir. 2002), we said that the Department of Housing and Urban Development's (HUD's) 2001 Statement of Policy (2001 SOP)[1] applies retroactively and governs the disposition of these cases.

BACKGROUND

Pamela and David Hirsch sought a mortgage loan to purchase a new home. They hired Rodgers Mortgage Company (Rodgers) to act as their mortgage broker. The Hirsches told Rodgers that they wanted a low interest rate and the lowest possible closing costs. Rodgers performed all the services necessary to allow the Hirsches to obtain a $150,000.00 home loan; and Rodgers selected Bank of America as the mortgage lender.[2]

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[1] Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53,052 (Oct. 18, 2001).

[2] It is undisputed that Rodgers provided a variety of services including these services:

(a) visiting the Hirsches on several occasions to obtain information;

(b) completing the loan application;

(Continued on following page)

Rodgers received a total of $2,125.00 for their services. The Hirsches paid Rodgers a $1,000.00 loan origination fee[3] and a $750.00 loan discount fee. In addition, Bank of America paid Rodgers a $375.00 YSP.[4] Rodgers' total compensation was approximately 1.4% of the $150,000.00 loan. Rodgers typically received compensation ranging from 1.5% to 2% of mortgage loans. The total compensation was in the lower range of what other mortgage brokers in that market charged for similar transactions.

The Hirsches' loan closed on 20 June 1996. Later, they filed this case – initially as a class action – claiming the payment of the YSP violated section 8 of the Real Estate Settlement Procedures Act (RESPA).[5] The district court

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(c) preparing various required disclosure documents;

(d) obtaining and verifying the Hirsches' financial records;

(e) obtaining a credit report;

(f) arranging an inspection of the property;

(g) arranging for the appraisal of the property;

(h) re-scheduling the closing to accommodate the Hirsches; and

(i) attending the closing of the loan.

[3] The Hirsches believed the $1000.00 covered all of Rodgers' services. The Hirsches claim they are unaware of services that Rodgers specifically performed to earn the YSP.

[4] The YSP was derived from published rate sheets which tied the amount of the YSP to the amount and the interest rate of the loan.

[5] Section 8 of RESPA prohibits the payment of referral fees, it provides in pertinent part:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607.

(Continued on following page)

denied class certification on 20 April 1999. In *Richardson v. BankAmerica Corp.*, No. 99-11554, slip op. (11th Cir. Jan. 24, 2003), we affirmed the district court's denial of class certification. While the class certification appeal was pending, Bank of America moved for summary judgment. The district court granted Bank of America's motion because the Hirsches "failed to demonstrate a genuine issue of fact as to Rodgers' actual provision of valuable goods and services or the reasonableness of their compensation for those services."[6]

DISCUSSION

In its 2001 SOP, HUD emphasized that a YSP – calculated based on the difference between the interest rate of the loan and the market rate – can be "a useful means to pay some or all of a borrower's settlement costs" as well as "a legitimate tool to assist the borrower." 2001 SOP, 66 Fed. Reg. 53052, 53054 (Oct. 18, 2001). HUD stressed that "neither Section 8(a) of RESPA nor the 1999 [SOP] supports the conclusion that a yield spread premium can be presumed to be a referral fee based solely upon the fact that the lender pays the broker a yield spread premium that is based upon a rate sheet. . . . " *Id.* at 53055. HUD cautioned that YSPs must be evaluated on

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This case was filed in the Middle District of Georgia. Pursuant to a consent order, the case was transferred to the Northern District of Georgia and consolidated with *Richardson v. BankAmerica Corp.*, Civil Action No. 1:98-CV-1031-ODE.

[6] Bank of America also moved for summary judgment on the Richardson's claims. Finding material facts at issue, the district court denied summary judgment on those claims. This portion of the district court's order is not before us, and we say nothing about it.

a case by case basis in the context of "the specific factual circumstances applicable to each transaction." *Id.* at 53054.

After stating YSPs were not per se legal or illegal, HUD clarified a two part test – which we adopted in *Heimmermann* – to determine the legality of a payment from a mortgage lender to a mortgage broker. *Id.* at 53055; *see also Heimmermann,* 305 F.3d at 1263-64. The test is satisfied here.

Under HUD's test, we first must "determine whether the broker has provided goods or services of the kind typically associated with a mortgage transaction." *Heimmermann,* 305 F.3d at 1263. HUD, in its 1999 Statement of Policy (1999 SOP)[7], listed some services that satisfy this factor. *See* 1999 SOP, 64 Fed. Reg. 10080, 10085 (Mar. 1, 1999). Rodgers provided many of these services: taking information from the borrower; filling out the application; analyzing the prospective borrower's income and debt; collecting financial information; initiating/ordering appraisals and inspections; providing disclosures; maintaining regular contact with the borrower; and attending the closing.[8]

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[7] Real Estate Settlement Procedures Act Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10,080 (March 1, 1999).

[8] The Hirsches argue Bank of America failed to identify services performed by Rodgers to earn the YSP in particular. But HUD instructs us to look at all the services performed and to evaluate them in the light of all the compensation (not the YSP in isolation) the mortgage broker received from any source.

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Because Rodgers did provide actual services, we proceed to the second step of HUD's test, "determining whether the total compensation paid to the broker is reasonably related to the total value of the goods or services actually provided." *Heimmermann,* 305 F.3d at 1264. "Total compensation includes fees paid by a borrower and any yield spread premium paid by a lender, not simply the yield spread premium alone." 2001 SOP, 66 Fed. Reg. at 53055. The Hirsches have never argued that Rodgers's total compensation was unreasonable in the light of the services Rodgers performed. Their argument, in a nutshell, was that the YSP, in particular, was not actually paid for – or tied to – specific services; so, they say the YSP was improper. This legal position was rejected by HUD's 2001 SOP which we adopted in *Heimmermann.*

> HUD does not believe that it is necessary or even feasible to identify or allocate which facilities, goods or services are performed or provided for the lender, for the consumer, or as a function of State or Federal law. All services, goods and facilities inure to the benefit of both the borrower and the lender in the sense that they make the loan transaction possible. . . .

1999 SOP, 64 Fed. Reg. at 10086. The Hirsches' subjective belief that the $1000 origination fee was supposed to cover these services does not automatically transform the YSP into a referral fee. Rodgers possibly should have done a better job of explaining its compensation to the Hirsches, but this fact does not make the YSP illegal. A YSP will fail the first element of HUD's test if it is "a payment to a broker who provides 'no, nominal, or duplicative work'. . . . " *Heimmermann,* 305 F.3d at 1263 n.8.

The Hirsches argument that the YSP was not itemized as a credit to the borrower in the 200 series of the HUD-1 form and therefore did not offset their costs is also unpersuasive. HUD recommends – but does not require – listing YSPs in the 200 series. 66 Fed. Reg. at 53056. The YSP was disclosed on the HUD-1 form exactly as HUD requires.

We accept the district court's unchallenged determination of reasonableness. Because both elements of HUD's test were met, we AFFIRM the district court's grant of summary judgment.[9]

AFFIRMED.

[9] The district court also granted summary judgment because of RESPA's one-year statute of limitations. Because we affirm the grant of summary judgment on this ground, we do not decide whether the claim was timely.